MOTION FILED OCT 10 1950

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 349

PUBLIC SERVICE COMPANY OF OKLAHOMA,
Appellant,

vs.

TOWN OF SKIATOOK, A MUNICIPAL CORPORATION, BOARD OF TRUSTEES OF THE TOWN OF SKIATOOK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

MOTION FOR LEAVE TO FILE STATEMENT OPPOSING JURISDICTION, STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

R. L. DAVIDSON, JR.,
JAMES G. DAVIDSON,
Counsel for Appellees.

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 34,166

A. W. PALMER AND PUBLIC SERVICE COMPANY OF OKLAHOMA, A CORPORATION,

Appellants,

vs.

TOWN OF SKIATOOK, A MUNICIPAL CORPORATION, ET AL.,

Appellees

MOTION FOR LEAVE TO FILE STATEMENT OPPOSING JURISDICTION OUT OF TIME

Come now the Town of Skiatook, a municipal corporation, the Board of Trustees of the Town of Skiatook, Earl E. Yeargain, J. Milton Patrick, Russell G. Jones, William J. Supernaw, Frank Cochran, and the Exchange Bank of Skiatook, a corporation, and respectfully move the court that they be given and granted leave to file their statement making against the jurisdiction of the Supreme Court of the United States in the above styled appeal and their motion to dismiss or affirm out of time.

In support of said motion it is respectfully shown as follows:

(1) That appellants served upon counsel for appellees their petition for the allowance of an appeal, assignment

of errors, order allowing appeal, statement of jurisdictional grounds, praecipe for transcript of record and citation on the 24th day of August, 1950.

(2) That appellants failed and neglected to comply with the rules of the Supreme Court of the United States, Rule 12, Paragraph 2(b), by failing and neglecting to serve upon appellees or any one of them or their counsel a statement directing attention to the provisions of Paragraph 3 of Rule 12 as required by said Paragraph 2 of Rule 12.

(3) That thereafter and on the 26th day of September, 1950, appellants served counsel for appellees with statement calling attention to Paragraph 3 of Rule 12 of the United States Supreme Court Rules as required by the provisions of Rule 12, Paragraph 2(b); that by reason of appellants failure to comply with the provisions of Rule 12, Paragraph 2(b), appellees were not apprized in sufficient time to file with the Clerk of the Court possessing the record their statement disclosing matters or grounds making against the jurisdiction of the Supreme Court of the United States within the time allowed by Paragraph 3 of Rule 12.

(4) That equity and justice require that appellees be given an opportunity to file their statement making against the jurisdiction and that the rights of appellants will not be prejudiced by the allowance and granting of this motion.

The statement making against the jurisdiction of the Supreme Court of the United States, together with a motion to dismiss or affirm, are hereto attached to be filed in this cause upon the granting of leave as herein requested.

Respectfully submitted,

R. L. Davidson, Jr.,
James G. Davidson,
Attorneys for Appellees.

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Appellees

STATEMENT OPPOSING JURISDICTION

Come now the appellees with leave of court having been first obtained and file this their statement of matter and grounds making against the jurisdiction of the Supreme Court of the United States as asserted by the appellants.

It is the contention of appellees that the Supreme Court of the United States is without jurisdiction of this purported appeal for the following reasons, to-wit:

(1) The decision of the Supreme Court of the State of Oklahoma herein complained of does not draw in question the validity of any statute of the State of Oklahoma on the ground of its being repugnant to the Constitution, treaties or laws of the United States. The record discloses that appellants have not at any stage of the proceedings attacked the validity of Title 11, OS Annotated, Sections 482 and 1042, and are raising the question of the validity of said

Sections of the Statutes of the State of Oklahoma for the first time on this attempted appeal. The mere objection to an exercise of authority granted by a statute whose validity is not attacked cannot be made the basis for review by appeal.

Cases relied upon by appellees as making against the jurisdiction are:

Jett Bros. Distilling Co. v. *Carrollton,* 252 U. S. 1, 64 L. Ed. 421;

Zucht v. *King,* 260 U. S. 174, 67 L. Ed. 194.

(2) The record discloses that no substantial federal question is presented for review for the following reasons:

(a) The Act of Congress, June 16, 1906, 34 U. S. Statutes at Large, pp. 267-278, Section 21, provides that the Osage Indian Reservation should be erected into a single county and that the boundaries of the county should not be changed until the lands of the Osage Indian Reservation had been allotted in severalty and until such boundaries should be changed by the Legislature of Oklahoma. The Statutes of the State of Oklahoma, to-wit, 11 O. S. 1941, Sections 482 and 1042, which sections appellants contend are repugnant to the Act of Congress, June 16, 1906, 34 U. S. Statutes at Large, Section 21, prescribe the method and manner and give the authority to municipal corporations in the State of Oklahoma to change, alter and expand their corporate limits. It is apparent that the boundary of a county is not synonymous and does not include the corporate limits of a city or town. The text of the pertinent portion of the Act of Congress, June 16, 1906, 34 Statutes at Large, pp. 267-278, Section 21; Section 482 of Title 11 O. S. 1941; and Section 1042 of Title 11 O. S. 1941, are appended hereto and marked Exhibits "A", "B" and "C", respectively. The provisions of the Statutes of the State of Oklahoma relating to the alteration and changing of county boundaries are contained in Title 19 O. S. 1941, Section 11,

etc., the provisions of Section 11 being appended hereto and marked Exhibit "D". The federal question attempted to be raised herein by appellants is frivolous and devoid of merit for the reason that it is based upon obviously false assumption, to-wit: That a change in city or town boundaries is the same equivalent to or tantamount to a change in county boundaries. The cases relied upon by appellees making against jurisdiction for the above grounds are: *Southern Pacific Co.* v. *Arizona,* 249 U. S. 472, 63 L. Ed. 713. *Parker* v. *McLain,* 237 U. S. 469, 59 L. Ed. 1051. (b) The question of the validity of the annexation of territory located in Osage County to the Town of Skiatook originally incorporated wholly within Tulsa County, Oklahoma, was raised by appellants in the trial of said cause by Sub-paragraph 5 of Paragraph VIII of plaintiffs' petition appearing at page 15 of the transcript now being prepared for this appeal. The only material allegation there made relates to the qualification of electors who were permitted to vote upon the proposition of issuing the bonds of the Town of Skiatook, and since the qualification of electors in municipal elections is a purely State question, the determination by the Supreme Court of the State of Oklahoma in the decision now being appealed from to the effect that said annexations of territory in Osage County were valid annexations and, therefore, the persons residing in Ward 3 of the Town of Skiatook, said Ward being located wholly within Osage County, were properly entitled to vote at the election authorizing the issuance of said bonds is not a decision involving a substantial federal question.

Kammerer v. *Kroeger,* 299 U. S. 302, 81 L. Ed. 253.

(3) The Supreme Court of the State of Oklahoma in its decision of May 23, 1950, decided said Cause No. 34,166 upon a non-federal ground which is in itself broad enough to sustain the judgment even though it should be determined that there is also involved an independent federal

question in the case. The Supreme Court of Oklahoma held that the annexing ordinances attacked by the appellants (plaintiffs below) could not be attacked in a collateral proceeding. As stated by the trial judge (page 53 of the transcript being prepared for this appeal), "The proceedings were under color of law and there was no legal impediment to the annexation. Consequently, the Town has at least a de facto existence and its existence cannot now be collaterally attacked." The cases relied upon by appellees are: *United States* v. *Hasting,* 296 U. S. 188, 80 L. Ed. 148; *Utley* v. *The City of St. Petersburg, Florida,* 292 U. S. 106, 78 L. Ed. 1155.

(4) The record in this appeal is devoid of any proof that the lands of the Osage Indian Reservation have not been allotted in severalty within the meaning of Act of Congress, June 16, 1906, 34 U. S. Statutes at Large, Section 21. The appellants did not introduce any testimony or evidence disclosing or tending to disclose the status of the lands of the Osage Indian Reservation. It was incumbent upon the plaintiffs below to sustain by proper proof all the necessary facts to prove the allegations of their petition. The Supreme Court of the United States will not indulge in conjecture, implication or inference to read a federal question into a cause where it does not appear from the record that such a question was involved. It must stand conceded that, if in truth and in fact the lands of the Osage Indian Tribe have been allotted in severalty, the inhibitions contained in the Act of Congress, June 16, 1906, 34 U. S. Statutes at Large, Section 21, relating to the changing of the boundaries of Osage County would constitute no further impediment to such a change. The appellants (intervening plaintiff below) in failing to introduce any evidence as to the status of the Osage Indian Tribal lands failed to sustain the burden of proof and cannot now seek appeal to this

court where it would be necessary for the court to go outside of the record to establish the facts necessary to raise a federal question, if any there be.

The decisions relied upon by appellees on the proposition stated in this section are: *Allen Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 86 L. Ed. 1154; *Lynch* v. *People of New York, ex rel. Pierson*, 293 U. S. 52, 79 L. Ed. 191.

R. L. Davidson, Jr.,
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TOWN OF SKIATOOK, A MUNICIPAL CORPORATION, ET AL.,

Appellees

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM

Come now the appellees above named and respectfully move to dismiss the appeal herein on the ground:

(1) That the case presents no appealable decision of the Supreme Court of the State of Oklahoma, but the right of review, if any there be, is properly by writ of certiorari.

(2) The case presents no substantial federal question.

(3) The decision of the Supreme Court of Oklahoma is supported by the determination of an independent question non-federal in character even if there be an independent federal question in said case.

(4) The record fails to disclose the necessary jurisdictional characteristics necessary for appeal.

And they further move, in the alternative, that, if the motion to dismiss is not granted, that honorable court affirm the decision of the Supreme Court of the State of Oklahoma on the ground that the questions on which the decision of this cause depends are so frivolous and unsubstantial as to need no further argument, all as appears in the statement of grounds making against the jurisdiction of the Supreme Court of the United States filed herewith.

R. L. Davidson, Jr.,
James G. Davidson,
Attorneys for Appellees.

EXHIBIT "A"

Act of Congress, June 16, 1906, Public Law 234, 34 US Statutes at Large, pp. 267-286, Section 21, p. 277

"Sec. 21 That the constitutional convention may by ordinance provide for the election of officers for a full State government, including members of the legislature and five Representatives to Congress, and shall constitute the Osage Indian Reservation a separate county, and provide that it shall remain a separate county until the lands in the Osage Indian Reservation are allotted in severalty and until changed by the legislature of Oklahoma, and designate the county seat thereof, and shall provide rules and regulations and define the manner of conducting the first election for officers in said county. * * *"

EXHIBIT "B"

TITLE 11, O. S. 1941, § 482.

Annexation On Petition Of Three-Fourths of Voters And Property Owners—On petition in writing signed by not less than three-fourths of the legal voters and by the owners of not less then three-fourths of the (in value) of the peoperty in any territory contiguous to any incorporated city or town and not embraced within the limits thereof, the City Council of the city or the board of trustees of the town, as the case may be, shall by ordinance annex such territory to such city or town upon filing a copy of such ordinance with an accurate map of the territory annexed (duly certified by the mayor of the city or the president of the board of trustees of the town), in the office of the register of deeds of the county where the annexed territory or the greater portion of it is situated, and having the same recorded therein. R. L. 1910, § 501.

EXHIBIT "C"

TITLE 11, O. S. 1941, § 1042

Addition Of Adjoining Plat—Whenever there shall be lots laid off and platted adjoining such town, and a record of the same is made in the register of deeds' office of the proper county, the trustees may by a resolution of their board extend the boundary of such town so as to include such lots; and the lots so annexed shall thereafter form a part of such town and be within the jurisdiction thereof. The trustees shall immediately thereafter file a copy of such resolution, together with the plat and map of survey defining the boundaries of such addition, in the office of the register aforesaid. R. L. 1910, § 718.

EXHIBIT "D"

TITLE 19, O. S. 1941, § 11

Vote by People—Taxable Property—Area—Population—Before any new counties shall be established, or any county lines in this state shall be altered or changed, such question shall first be submitted to a vote of the qualified electors residing in the territory to be formed into such new county or transferred to another county, and shall be approved by the sixty per centum of the votes cast in each particular territory sought to be taken from an existing county in said election; provided, no new county shall be formed of less than four hundred square miles taxable area, nor with a population of less then fifteen thousand people, nor with taxable wealth less than two and one-half million dollars, as shown by the current tax rolls. Nor shall any territory be taken from an existing county for any purpose bringing the newly created lines of such existing county nearer than ten miles to the county seat thereof. Nor shall the taxable area, population or taxable wealth of said existing county be reduced below that required for a new county. Nor shall any territory, in any

case, be transferred from one county to an existing county, if, by such transfer of territory, the county from which the territory to be taken will then be smaller in area than the county to which the addition is made; provided, that when the territory is to be transferred from one existing county to either a new or an existing county, there must be sixty per centum of the vote cast in such particular territory in favor of the transfer, and, in case the transfer to be to an existing county, the acceptance of such territory must first be approved by a majority vote of the electors of said county; provided, that any such election shall be governed by the general election laws, when same are not in conflict herewith. Laws 1910-11, ch. 40, p. 72, § 1.